No. 78-1756

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HELEN MITCHELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-17a) is reported at 591 F.2d 1300.

JURISDICTION

The decision of the Court of Claims was filed on January 24, 1979. On April 19, 1979, The Chief Justice extended the time for filing a petition for a

writ of certiorari to and including May 24, 1979. The petition was filed on May 23, 1979, and was granted on June 18, 1979 (A. 85). The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the United States is answerable in money damages for alleged breaches of trust in connection with the management of forest resources situated on lands allotted to individual Indians under the General Allotment Act of 1887.

STATUTES INVOLVED

1. Section 1 of the General Allotment Act of 1887, ch. 119, 24 Stat. 388, as amended, 25 U.S.C. 331, provides in pertiment part:

> In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. * * *

2. Section 5 of the General Allotment Act of 1887, ch. 119, 24 Stat. 389, 25 U.S. 348, provides in pertinent part:

> Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * * and that at the expiration of said period the United States will convey the same by patent to said Indian * * *, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *.

3. 28 U.S.C. 1491 provides in relevant part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *

4. 28 U.S.C. 1505 provides:

> The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe,

band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

STATEMENT

In four actions consolidated before the Court of Claims, respondents seek to recover damages from the United States for the alleged mismanagement of timber resources on land allotted to individual Indians from the Quinault Reservation in the State of Washington. The respondents are 1,465 individuals owning interests in such allotments, the Quinault Tribe, which now holds portions of the allotted lands, and the Quinault Allottees Association, an unincorporated association of Quinault Reservation allottees.

1. The Quinault Reservation was established in 1873 by executive order. I Kappler 923. Allotment of the Reservation lands to individual Indians began in 1905, pursuant to the General Allotment Act of 1887, ch. 119, 24 Stat. 388, 25 U.S.C. 331 *et seq.* Section 5 of the Act, 25 U.S.C. 348, provided that the United States would "hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * *." This language was incorporated in the deed given to each allottee. The period during which the United States was to hold

the title of the lands thus allotted was subsequently extended indefinitely by Section 2 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 462.

Much of the land within the Quinault Reservation is forest land. In the early years of this century, the government took the position that the forested areas of the Quinault Reservation were not to be allotted under Section 1 of the General Allotment Act because they were not suited for "agricultural or grazing purposes * * *." 25 U.S.C. 331. This Court rejected that view in *United States* v. *Payne*, 264 U.S. 446 (1924), noting that "[i]t is common knowledge that vast bodies of land, originally covered with timber, in some of the public land States, including Washington, have been * * * cleared and brought under cultivation." *Id.* at 449. The Court concluded that the General Allotment Act did not preclude "an allotment of timbered lands, capable of being cleared and cultivated * * *." *Ibid.* Accordingly, pursuant to this Court's decision in *Payne*, the forested lands of the Quinault Reservation were allocated to individuals under the General Allotment Act, and by 1935 the entire Reservation had been allotted.

Since 1910, the Secretary of the Interior has been authorized to sell timber on the unallotted lands of any Indian reservation (Section 7 of the Act of June 25, 1910, ch. 431 36 Stat. 857, as amended, 25 U.S.C. 407) and to consent to the sale of timber by the owner of any Indian land "held under a trust or other patent containing restrictions on alienations" (Section 8 of the Act of June 25, 1910, ch. 431, 36 Stat. 857, as

amended, 25 U.S.C. 406). The Secretary is directed to pay the proceeds of such sales (after deducting a charge for administrative expenses) to the Tribe or the individual patent holder. 25 U.S.C. 406, 407. Prior to 1964, the Secretary was authorized to consent to sales of timber on individual holdings "pursuant to regulations" (Section 8 of the Act of June 25, 1910, ch. 431, 36 Stat. 857), and the statute did not detail how the Secretary should exercise this discretion. Since 1964, however, the Secretary has been instructed to consider the "needs and best interests of the Indian owner and his heirs" in approving the sales of timber on individual Indian holdings (Act of April 30, 1964, Pub. L. No. 88-301, 78 Stat. 187, amending 25 U.S.C. 406).

2. Respondents alleged in the Court of Claims that the Secretary has engaged in improper practices in connection with his management of timber lands allotted from the Quinault Reservation under the General Allotment Act. Specifically, they alleged that he has (Pet. App. 2a-3a n.4):

(1) failed to obtain a fair market value for timber sold;

(2) failed to manage timber on a sustained yield basis and to rehabilitate the land after logging;[1]

(3) failed to obtain payment for some merchantable timber;

[1] Since 1934, the Secretary has been required to adhere to the principles of sustained-yield forestry on all Indian forest lands under his supervision. 25 U.S.C. 466.

(4) failed to develop a proper system of roads and easements, and exacted improper charges from allottees for roads;

(5) failed to pay interest on certain funds;

(6) paid insufficient interest on certain funds;

(7) exacted excessive administrative charges from allottees.

They contend that they are entitled to recover in money damages for these alleged misdeeds because the Secretary's actions have breached a fiduciary duty owed them by the United States as trustee of the allotted lands.

The United States moved to dismiss respondents' actions in the Court of Claims on the ground that the United States had not consented to these suits or otherwise waived its sovereign immunity with respect to respondents' claims. The Court of Claims, sitting en banc, denied the government's motion. The court held that, in enacting the General Allotment Act, Congress created a cause of action for damages against the United States in favor of Indian allottees whenever they can show a "breach of trust" by the government in the management of their lands (Pet. App. 5a-6a).

The court reasoned that the General Allotment Act imposed fiduciary obligations on the United States[2]

[2] Because the court concluded that the Act by itself established the government's fiduciary responsibility and the consent to suit for breaches of trust, the court found it unnecessary to consider whether non-statutory, "unanchored judge-created principles of fiduciary law" concerning the govern-

and that this "congressional declaration of trust * * * 'can fairly be interpreted as mandating compensation by the federal government for the damage sustained' because of a proven breach of trust" (Pet. App. 6a, quoting *United States* v. *Testan*, 424 U.S. 392, 400 (1976)). The court stated that this conclusion was "the necessary inference from the statute" (Pet. App. 7a) because, if there is no damage remedy for proven breaches of trust, "there is in effect no real redress at all for a departure from the standards Congress imposed on the Government in the General Allotment Act" (*ibid.*). The court thus concluded that "breach of trust" claims for money damages under the General Allotment Act are within its jurisdiction under 28 U.S.C. 1491 as claims founded upon an "Act of Congress" (Pet. App. 4a-7a).[3] Similarly, the court concluded that the "breach of trust" claims brought by the Tribe as successor to individual allottees under

ment's relations with Indian tribes can create a right to money damages within the court's jurisdiction (Pet. App. 5a, 14a). See pages 29-33, *infra*. The court similarly found it unnecessary to consider whether a cause of action for money damages against the United States is established by "the other pieces of legislation and regulation invoked * * * by the Indians" (Pet. App. 12a). See, *e.g.*, 25 U.S.C. 406 (authority to consent to sales of timber or Indian lands); 25 U.S.C 466 (operation of forest lands on sustained-yield basis); 25 U.S.C. 318a, 323-325 (use of roads and rights of way). See pages 26-29, *infra*.

[3] The court did not consider whether the allottees' claims would be within its jurisdiction as claims "for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. 1491 (Pet. App. 5a). Nor did it consider whether the United States would be subject to suit on such claims.

the Act fall within its jurisdiction under 28 U.S.C. 1505 over tribal claims based on the "laws * * * of the United States" (*ibid.*).[4]

SUMMARY OF ARGUMENT

The Court of Claims has jurisdiction over individual claims for money damages founded upon an "Act of Congress," 28 U.S.C. 1491, and over tribal claims for money damages based upon the "laws * * * of the United States," 28 U.S.C. 1505. These jurisdictional provisions do not, however, create any substantive right enforceable against the United States. They merely provide jurisdiction for the court to hear such claims "whenever the substantive right exists." *United States* v. *Testan*, 424 U.S. 392, 398 (1976).

The Court of Claims erred in concluding that the General Allotment Act creates a substantive right to money damages for "breach of trust" in the management of allotted lands. Nothing in the statute or its legislative history overcomes the presumption that the

[4] The court did not consider whether the United States is subject to suit for "breach of trust" claims with respect to lands held by the Tribe under statutes other than the General Allotment Act. The Tribe's pleadings (*e.g.*, A. 18, 19) can be construed to allege that the tribal lands at issue in this case are held by the Tribe as the successor to individual allottees under the Act.

The court also did not reach the question whether the Quinault Allottees Association is a "tribe, band or other identifiable group of American Indians," whose claims may be brought within the court's jurisdiction under 28 U.S.C. 1505. Accordingly, the issue was not raised in the government's petition.

United States has not consented to suit in money damages. The statute contains no "provision * * * that expressly makes the United States liable" or "grant[s] * * * [the] right of action with specificity." 424 U.S. at 400. Nor does the Act speak in terms of money claims against the United States or the right to receive certain payments on the proof of particular facts. The statute thus cannot " 'in itself * * * be fairly interpreted as mandating compensation' " for a breach of its obligations, as *Testan* requires. *Id.* at 401-402.

The Court of Claims was mistaken in concluding that a damage remedy must be implied because no other remedy can correct "damage already done" (Pet. App. 7a) and the damage remedy is necessary to afford "real redress" (*ibid.*) under the Act. This Court has rejected the claim that a statute establishing substantive rights "of necessity create[s] a waiver of sovereign immunity such that damages are available to redress their violation." *United States* v. *Testan*, *supra*, 424 U.S. at 400-401. Moreover, the Court of Claims conceded that prospective remedies are available to enforce the requirements of the Act (Pet. App. 7a). Thus, here as in *Testan* (424 U.S. at 403), "the situation * * * is not that Congress has left the respondents remediless, * * * but that Congress has not made available * * * the remedy of money damages."

Nor, as respondents suggest, does the special relationship between the United States and Indian tribes —based on non-statutory, "unanchored, judge-created principles of fiduciary law" (Pet. App. 5a)—establish a right to money damages for "breach of trust" within the court's jurisdiction over claims "for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. 1491. Only Congress, and neither the courts nor executive officers, may consent to suit against the United States, and any waiver must therefore be effected by "affirmative statutory authority." *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940). "[U]nanchored, judge-created principles of fiduciary law" employed in judicial decisions to describe the underlying basis of the relations between the United States and Indian tribes do not constitute affirmative statutory consent to suit.

ARGUMENT

THE UNITED STATES IS NOT LIABLE IN MONEY DAMAGES FOR BREACHES OF TRUST IN THE MANAGEMENT OF LANDS ALLOTTED UNDER THE GENERAL ALLOTMENT ACT

A. The General Allotment Act Does Not Constitute Consent By The Government To Be Sued In Money Damages For Breaches Of Trust

1. *The General Allotment Act does not unequivocally and expressly consent to suit or mandate compensation in money damages for breaches of trust*

The Court of Claims has jurisdiction of "any claim against the United States founded either upon the Constitution, or any Act of Congress * * *." 28 U.S.C. 1491 (individual claimants). See also 28 U.S.C. 1505 (tribal claimants). In *United States* v. *Testan*, 424 U.S. 392 (1976), this Court rejected the contention that the jurisdictional provisions of the Tucker Act waive the "sovereign immunity [of the

United States] with respect to any claim invoking a constitutional provision or a federal statute * * *." *Id.* at 400. Because " 'the only judgments which the Court of Claims [is] authorized to render against the government . . . are judgments for money found due from the government to the petitioner' " (*United States* v. *King*, 395 U.S. 1, 3 (1969), quoting *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575 (1867), a suit falls within the court's jurisdiction as a claim founded upon "the Constitution, or any Act of Congress" only if the constitutional provision or statute relied on creates a substantive right against the United States for "actual, presently due money damages," *United States* v. *King*, *supra*, 395 U.S. at 3. See *United States* v. *Testan*, *supra*, 424 U.S. at 398. The Tucker Act itself does "not create any substantive right enforceable against the United States for money damages," *ibid.*; instead, it merely "confers jurisdiction upon [the Court of Claims] whenever the substantive right exists." *Id.* at 398.[5] See also Devel-

[5] *Testan* addressed the jurisdiction of the Court of Claims over claims brought by individuals under the Tucker Act, 28 U.S.C. 1491. The same analysis applies, however, to the jurisdiction of the Court of Claims under Section 24 of the Indian Claims Commission Act, ch. 959, 60 Stat. 1055, recodified as 28 U.S.C. 1505, which extended the court's jurisdiction to claims brought by Indian tribes against the United States.

The Indian Claims Commission Act implemented a dual approach to the determination of Indian claims. For claims arising prior to the effective date of the Act (August 13, 1946), the Indian Claims Commission was authorized to "hear and determine" claims against the United States based on legal and equitable principles and on considerations of "fair and honorable dealings that are not recognized by any existing rule of law or equity." 25 U.S.C. 70a. Congress intended to place tribal claimants in a preferential position in the determination of historical claims based on moral, as well as legal, obligations. For claims arising after that date, however, Congress intended to place tribal claimants on an equal footing with persons seeking recovery under the Tucker Act:

> As respects claims accruing after its adoption this bill confers jurisdiction on the Court of Claims to determine and adjudicate any tribal claim of a character which would be cognizable in the Court of Claims if the claimant were not an Indian tribe. In such cases the claimants are to be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, * * * as in cases brought in the Court of Claims by non-Indians under Section 145 of the Judicial Code (36 Stat. 1136, 28 U.S.C. 250) [now 28 U.S.C. 1491], as amended.

H.R. Rep. No. 1466, 79th Cong., 1st Sess. 13 (1945). See also *Hearings on H.R. 1198 and H.R. 1341 Before the House Comm. on Indian Affairs*, 79th Cong., 1st Sess. 149 (1945) (Assistant Solicitor Cohen). Accordingly, when the Indian Claims Commission Act was first enacted it contained the following provision in Section 24 (now 28 U.S.C. 1505):

> In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same maner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, and to the same offsets, counterclaims, and demands, as in cases brought in the Court of Claims under * * * section [250 of this title] [now 28 U.S.C. 1491]: *Provided, however,* That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, band or groups. [60 Stat. 1055-1056.]

This language in the original version of the Act was deleted as surplusage when Section 24 was recodified as 28 U.S.C. 1505, by the Act of May 24, 1949, ch. 139, Section 89(a), 63 Stat. 102, because "the provision conferring jurisdiction

cannot in any view alter the relationship of the Government with its Indians." H.R. Rep. No. 352, 81st Cong., 1st Sess. 15-16 (1949).

The essential objective of 28 U.S.C. 1505 was thus to provide a basis for jurisdiction in the Court of Claims for suits brought by Indian Tribes that parallels the jurisdiction provided for individual claimants by 28 U.S.C. 1491. See *Klamath and Modoc Tribes* v. *United States*, 174 Ct. Cl. 483, 489-490 (1966). See also note 24, *infra*.

Because, with respect to post-1946 claims, 28 U.S.C. 1505 merely parallels the jurisdictional grant in 28 U.S.C. 1491 for claims that "would be cognizable in the Court of Claims if the claimant were not an Indian tribe" (H.R. Rep. No. 1466, *supra*, at 13), and because the United States is entitled to the same defenses, both at law and in equity, under 28 U.S.C. 1505 as under 28 U.S.C. 1491 (*ibid.*), the conclusion that the Tucker Act "[did] not create any substantive right enforceable against the United States for money damages" (*United States* v. *Testan*, *supra*, 424 U.S. at 398) is equally applicable to the grant of jurisdiction in 28 U.S.C. 1505. The right to recover on a claim based on a "law * * * of the United States" under 28 U.S.C. 1505—as for claims based on an "Act of Congress" under 28 U.S.C. 1491—must therefore be premised on the existence of a substantive right to money damages under the statute that is claimed to be violated. See *United States* v. *Testan*, *supra*, 424 U.S. at 398-400.

The Court of Claims did not hold to the contrary. The court, however, did cite portions of the legislative history of the Indian Claims Commission Act suggesting that the Act granted jurisdiction over "any [tribal] *controversy with the Federal Government that may arise in the future*" (Pet. App. 10a; emphasis by court, quoting H.R. Rep. No. 1466, 79th Cong., 1st Sess. 3 (1946)). But the same sentence of this House Report quoted by the court also states that the jurisdictional grant in 28 U.S.C. 1505 gives Indian claimants, with respect to "any controversy with the Federal Government," "the same right as his white or black neighbor" to secure relief. H.R. Rep. No. 1466, *supra*, at 3. The jurisdictional grant in 28 U.S.C. 1505 was thus directly linked to the grant of jurisdiction for individual claimants in 28 U.S.C. 1491. The comments made by then-Representative Jackson, to the

opments, *Remedies Against The United States And Its Officials*, 70 Harv. L. Rev. 827, 876 (1957).

The Court of Claims erred in concluding that the General Allotment Act constitutes the necessary consent to suit and creates a substantive right to money damages for "breach of trust" in the management of allotted lands. Because of the basic principle "that a waiver of immunity cannot be implied but must be unequivocally expressed" (*United States* v. *Testan*, *supra*, 424 U.S. at 399, quoting *United States* v. *King*, *supra*, 395 U.S. at 4), the mere claim that a statute has been violated does not, by itself, establish a right to recover against the United States in money damages. Instead, a claim for money damages based on a statute must overcome the "presumption" that the United States has *not* consented to suit. *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927). Consent must therefore be "clearly shown" (*ibid.*) by a "provision" * * * that expressly makes the United States liable" or "grant[s] * * * [the] right of action * * * with specificity." *United States* v. *Testan*, *supra*, 424 U.S. at 400. The statute on which the claim is based must "unequivocally express[]" the government's consent to suit (*id.* at

effect that "special Indian jurisdictional acts would be unnecessary with respect to "misappropriation" of Indian funds by government officials (Pet. App. 10a, quoting 92 Cong. Rec. 5313 (1946)) is also consistent with this conclusion. For acts of misappropriation may constitute takings for which just compensation is required, and such claims have long been within the Court of Claims' jurisdiction under 28 U.S.C. 1491. See pages 20-21, *infra*.

399) and must, therefore, "in itself * * * be fairly interpreted as *mandating* compensation by the federal government for the damage sustained." *Id.* at 401-402 (emphasis supplied), quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967).[6]

The General Allotment Act does not constitute an unequivocal expression of the government's consent to suit in money damages for breaches of trust, as required by the Court's decision in *Testan*. To be sure, Section 5 of the Act provides that the United States is to "hold the land * * * in trust for the sole use and benefit of the" allottee. 25 U.S.C. 348. But the unelaborated statement in the statute that the allotted lands are to be held "in trust" does not clearly show a consent to suit in money damages if the trust is breached.[7] The fact that the statute is claimed to be violated cannot by itself support the conclusion that sovereign immunity has been waived, and "[n]othing on the face" of the statute (*Santa Clara*

[6] In concluding in *Testan* that a separate statute must be shown establishing a cause of action under the Tucker Act, the Court distinguished claims based on contract or for money "improperly exacted or retained." 424 U.S. at 400, 401. As we noted in the petition (Pet. 8 n.3), however, none of respondents' claims, with the possible exceptions of the claims based on excessive administration and road fees (Pet. App. 13a-14a n.19), are for money improperly exacted or retained. Nor are any of respondents' claims arguably founded on an "express or implied contract with the United States," 28 U.S.C. 1491. See note 21, *infra*.

[7] Moreover, as is discussed below (pages 21-29, *infra*), the Court of Claims erred in concluding implicitly that the "trust" obligation established by the Act extended to management functions.

Pueblo v. *Martinez*, 436 U.S. 49, 59 (1978)) "expressly makes the United States liable" in money damages or grants a right of action "with specificity." *United States* v. *Testan*, *supra*, 424 U.S. at 399-400.

Moreover, the statute cannot "in itself * * * fairly be interpreted as mandating compensation" for a breach of its obligations, as *Testan* requires. 424 U.S. at 401-402. A statute that "leave[s] no question" that refunds are to be made to particular claimants by an administrative officer, *United States* v. *Hvoslef*, 237 U.S. 1, 10 (1915), or that creates a "right to recover a certain sum," *Mosca* v. *United States*, 417 F.2d 1382, 1385 (Ct. Cl. 1969), may "in itself" fairly be interpreted as mandating compensation for its breach because the statutory "right" has substance only if it can be enforced in a suit for money damages if the claim is not paid. See also *Medbury* v. *United States*, 173 U.S. 492, 497 (1899) (statute created a right to be "repaid" by an administrative officer under "facts stated" in the statute). Similarly, if the statutory right "speaks in terms of money damages or of a money claim against the United States," *Gnotta* v. *United States*, 415 F.2d 1271, 1278 (8th Cir. 1969), cert. denied, 397 U.S. 934 (1970), the statute may "in itself * * * fairly be interpreted as mandating compensation" by the United States, for otherwise the "right" the statute creates would have no meaning. See *United States* v. *Testan*, *supra*, 424 U.S. at 402. In these contexts, the presumption that Congress meant to accomplish some substantive end by creating a "right to recover a certain sum" or a

"right" to a "repayment" overcomes the opposing presumption that Congress has not consented to suit. Compare *Medbury* v. *United States, supra,* 173 U.S. at 497; *United States* v. *Ohio Oil Co.*, 163 F.2d 633, 636 (10th Cir. 1947), with *Eastern Transportation Co.* v. *United States, supra,* 272 U.S. at 686. But nothing in the General Allotment Act speaks in terms of money claims against the United States or of the right to receive certain payments on the proof of particular facts. Nothing in the statute "in itself" (*ibid.*) considers, much less mandates, that money damages are to be available as a remedy for the breach of its obligations.

The Court of Claims concluded, however, that even though the General Allotment Act does not in terms purport to establish a cause of action in money damages for violations of its duties, such a remedy must be inferred because otherwise there "is in effect no real redress at all for a departure from the standards Congress imposed on the Government in the * * * Act" (Pet. App. 7a).[8] The court conceded that

[8] The Court of Claims placed some reliance on language in *Eastport S.S. Corp.* v. *United States, supra,* 372 F.2d at 1007, 1008, which suggests that a statute may create a right to money damages "by implication" (Pet. App. 7a n.12). But the Court in *Testan* did not quote or endorse this general language in *Eastport* in holding that a statute must "unequivocally," albeit by "fair interpretation," mandate compensation for its breach. See 424 U.S. at 398-400. Indeed, in *Testan* (424 U.S. at 400) the Court cited *Mosca* v. *United States, supra,* as consistent with its holding, and in *Mosca* the consent to suit was interpreted from a statute creating a "right to recover a certain sum," 417 F.2d at 1386. As we

"prospective judicial review by way of injunction or mandamus" (*ibid.*) may be available to enforce the Act. But the Court concluded that these prospective remedies were inadequate because they "would be meaningless for damage already done." *Ibid.*

The court's analysis is fundamentally flawed. The fact that retrospective damages for breaches of trust in the management of allotted lands are not recoverable in a suit for injunctive relief cannot support the conclusion that Congress consented to suit in money damages for such claims. It is the ordinary result of sovereign immunity that unconsented claims for money damages are barred. The fact that such damages cannot be recovered without the sovereign's consent does not support the conclusion that consent has been given. If the Court were correct in concluding that a remedy in damages must be implied whenever the remedy is necessary to correct "damages already done" (Pet. App. 7a), the doctrine of sovereign immunity would be meaningless. Moreover, "many of the federal statutes * * * that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous." *United States* v. *Testan, supra,* 424 U.S. at 404. Thus, in *Testan* this Court rejected "as unsound" the claim that a statute establishing substantive rights "of necessity create[s]

discuss in the text, a statute affording an individual a right to an administrative "repayment" of certain funds constitutes an "unequivocal" mandate for compensation, even though this results only from fair interpretation of the statute. See *Medbury* v. *United States, supra,* 173 U.S. at 497.

a waiver of sovereign immunity such that money damages are available to redress their violation." 424 U.S. at 400-401.

As the Court of Claims recognized, allottees are not wholly without remedies to protect their statutory interest in having the allotted lands held in trust for their "sole use and benefit." 25 U.S.C. 348. Alleged violations of the duty to "hold [the land] in trust" under the Act may be remediable by injunctive or mandamus actions against the Secretary. See 28 U.S.C. 1331(a), 1361; 5 U.S.C. 702.[9] Furthermore, actions by the Secretary that appropriate the allotted lands for other uses, or uses by other persons, may be remediable in a suit for damages under the Fifth Amendment.[10] See *United States* v. *Testan*, *supra*,

[9] 5 U.S.C. 702 provides in part (emphasis supplied):

> An action in a court of the United States *seeking relief other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States * * *.

Thus, in consenting generally to suits for injunctive and declaratory relief, Congress expressly preserved sovereign immunity in suits seeking relief in money damages.

[10] An allottee who claims that he has been "unlawfully denied or excluded from any allotment" may bring suit under 25 U.S.C. 345 in federal district court to obtain a decree of his entitlement to the disputed allotment. This limited, express statutory remedy for allottees further negates the suggestion that Congress intended, without so stating, to allow an award in money damages.

424 U.S. at 401; *United States* v. *Creek Nation*, 295 U.S. 103, 109-110 (1935); *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933). The substantive provisions of the Act are thus not made meaningless by the absence of a damage remedy which Congress did not provide. Here, as in *Testan* (424 U.S. at 403),

> [t]he situation * * * is not that Congress has left the respondents remediless, * * * but that Congress has not made available * * * the remedy of money damages * * *.

The Court of Claims thus erred in "go[ing] beyond the language of the statute [to] impose a liability [in money damages] which the Government has not declared its willingness to assume." *Price* v. *United States*, 174 U.S. 373, 375 (1899).

2. The legislative history of the General Allotment Act supports the conclusion that Congress did not consent to suit for money damages for breaches of trust in the management of allotted lands

a. In the lengthy legislative history preceding passage of the General Allotment Act,[11] there is no "unequivocal expression of * * * legislative intent" (*Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 59) to subject the United States to suit in money

[11] The Act was enacted in 1887. Substantially similar bills were debated in the Senate as early as 1881. S. 1773, 46th Cong., 3d Sess. (1880). See 11 Cong. Rec. 778-788, 873-882, 904-913, 994-1003, 1028-1036, 1060-1070 (1881). Bills essentially identical to the legislation ultimately enacted were passed by the Senate in 1882 and 1884 but not acted upon in the House. S. 1455, 47th Cong., 1st Sess. (1882); S. 48, 48th Cong., 1st Sess. (1883). See 13 Cong. Rec. 3212 (1882); 15 Cong. Rec. 2240-2242, 2277-2280 (1884); 16 Cong. Rec. 218, 580 (1885); H.R. Rep. No. 2247, 48th Cong., 2d Sess. (1885).

damages for claimed breaches of trust under the Act. Indeed, throughout the debates on this legislation, there is not one statement by any Member of Congress suggesting that the United States would be liable to suit in money damages with respect to any claim under the Act. To the contrary, the legislative history reveals an intent that is radically inconsistent with the Court of Claims' broad conclusion that Congress consented to a damage remedy against the United States as a means of enforcing the "standards * * * imposed on the Government in the General Allotment Act" (Pet. App. 7a).

In providing for the allotment of lands to individual Indians under this Act, Congress intended the allotted lands to be occupied as homesteads by the allottees for their personal use in agriculture or grazing. See *Mattz* v. *Arnett*, 412 U.S. 481, 486 (1973); 13 Cong. Rec. 3211 (1882) (Senator Dawes) (the allottee is to be "the occupant of the land and enjoy all its use * * *)"; 17 Cong. Rec. 1630-1631 (1886) (Senators Plumb and Dawes); 18 Cong. Rec. 190-191 (1887). The allotment of individual homesteads to Indians was pursuant to a congressional policy of assimilating Indians into the larger society, a policy that was based on the belief that the holding of land in common was the central obstacle to "civilization" of the Indian. See F. Cohen, *Handbook of Federal Indian Law* 206-209 (1942); 11 Cong. Rec. 1060 (1881). Congress anticipated that only lands suitable for homesteading would serve this objective of

assimilation, and thus provided in Section 1 of the Act, 25 U.S.C. 331, for the allotment only of lands that "may be advantageously utilized for agricultural or grazing purposes * * *." See *United States* v. *Payne*, *supra*, 264 U.S. at 449. It was Congress' intent that, after a 25-year period during which the Indian allottee was to be "the occupant of the land and enjoy all its use" (13 Cong. Rec. 3211 (1882) (Senator Dawes)), the allottee would receive a fee patent title to the land from the United States. 25 U.S.C. 348.[12]

The original version of this legislation in the Senate provided that, during the initial 25-year period of the allotment, title to the allotted land would be held by the Indian under a simple restraint on alienation, rather than by the United States "in trust." This language was amended at the request of Senator Dawes to provide that the United States would "hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * *." 13 Cong. Rec. 3212 (1882). In offering the amendment, Senator Dawes explained that the "trust" provision would "secure to the Indian his rights" to title in the land at the expiration of 25 years "precisely as the other provision [containing a restraint on

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[12] The period during which the title was to be retained by the United States was not extended indefinitely until Congress enacted Section 2 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 462.

alienation] would." [13] *Ibid.* The difference achieved by the amendment was that, while the States may have attempted to tax the allotted lands if title were given to individual Indians under simple restraints on alienation, placing title in the United States in trust for the allottees made it "impossible to raise the question of [state] taxation * * *." *Ibid.*

The General Allotment Act thus did not, as the Court of Claims implicitly concluded, anticipate that the United States would undertake broad management responsibilities as a statutory trustee for the allotted lands. The allottees were expected to occupy and manage the land, enjoying all its use in agricultural and grazing activities. The United States undertook to "hold the land * * * in trust" *not* with the objective of overriding or controlling the Indians' right to exclusive use and possession of the land, but instead for the limited purposes of (a) restraining improvident alienation of the land by the allottees and (b) affording an immunity from state taxation for the period during which legal title remained in the United States. 13 Cong. Rec. 3211 (1882) (Senator Dawes).[14] This limited objective of the statutory

[13] Senator Dawes provided this explanation of his amendment in the course of offering the identical language as an amendment to an allotment act for the Umatilla Reservation. 13 Cong. Rec. 3210, 3211 (1882). See *id.* at 3212.

[14] *Minnesota* v. *United States*, 305 U.S. 382 (1939), is not inconsistent with this conclusion. In that case, the Court held that the United States was an indispensable party in a state action condemning allotted lands because the United States held legal title to the lands. The government's limited authority to "hold" the lands was there at issue; the Court did not suggest that the United States would be liable in damages for any breach of trust or detail the nature of the trust duty. In an analogous context, however, the Court has noted, with regard to an Indian allotment in fee with a restraint on alienation, that "the United States holds title in trust only to prevent improvident alienation." *United States* v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206, 213 (1943), aff'g 127 F.2d 349, 353-354 (10th Cir. 1942). The same description has been applied to lands allotted under the General Allotment Act in *Eastman* v. *United States*, 28 F. Supp. 807, 808 (W.D. Wash. 1939), rev'd on other grounds, 118 F. 2d 421 (9th Cir.), cert. denied, 314 U.S. 635 (1941). See also *Nicodemus* v. *Washington Water Power Co.*, 264 F.2d 614, 616-617 (9th Cir. 1959); *Fort Peck Indians* v. *United States*, 132 F. Supp. 222 (Ct. Cl. 1955).

undertaking to "hold the land * * * in trust" is reflected at several points in the legislative history. See 15 Cong. Rec. 2240-2242 (1884) (remarks of Senators Dawes, Coke and Conger); 15 Cong. Rec. 2278-2279 (1884) (remarks of Senators Miller, Coke and Dawes). The Court of Claims' broad conclusion that a damage remedy for breach of the "trust" under the Allotment Act is necessary to enforce the "standards Congress imposed" (Pet. App. 7a) is inconsistent with the narrow objectives that Congress sought to accomplish in enacting this legislation.[15]

[15] There is no claim in this case that any allottee has been denied the right to occupy and use his allotment. If, however, the United States were to misappropriate an allotment and displace its proper owner, the allottee is authorized to sue for the recovery of his allotment under 25 U.S.C. 345. There is no need for any reliance on a "breach of trust" theory to support the Indian's claim of right to ownership of the allotment.

Nor is there any claim in this case that the allottee has been subjected to improper state taxation contrary to Congress'

b. Prior to 1910, the Secretary of the Interior had no general statutory authority to consent to any sales of timber on Indian lands. Early decisions had established that Indians held only the right of occupancy, and not fee title, to Indian lands and that they therefore could cut timber from their lands only for the purpose of improving the land and not for the primary purpose of sale. *United States* v. *Cook*, 86 U.S. (19 Wall.) 591 (1873). The Attorney General ruled in 1889 that, unless some statute expressly authorized the sale, this same rule was equally applicable to allotted as well as unallotted lands. 19 Op. Att'y Gen. 232 (1889). Congress ratified the Attorney General's ruling by enacting the Act of February 16, 1889, ch.

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objection in placing title to the land in the United States in trust. If an allottee were subjected to improper state taxation, it may be that a failure by the United States to oppose the tax would be a breach of the limited objectives of the statutory "trust." In *United States* v. *Mason*, 412 U.S. 391, 398 (1973), the United States did not argue that it was immune to a suit for money damages by allottees who claimed that the government committed a breach of trust by failing to resist state tax assessments on the allotted lands. The government's defense on the merits was sufficient in that case, *id.* at 392, and sovereign immunity was not raised. Even assuming that failure to protect the lands from state taxation would in some circumstances be a breach of the limited statutory "trust" (see *id.* at 398), there is nothing in the Act or its history that constitues an "unequivocal expression" (*Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 59) of a congressional consent to suits in money damages against the United States even in this limited context. See also pages 11-21, *supra*. In any event, in this case the Court of Claims inferred a waiver of immunity as to duties that the Act did not impose.

172, 25 Stat. 673, which authorized the sale of dead timber on Indian allotments and reservations but did not permit the sale of live timber.[16] Thereafter, Congress enacted special legislation from time to time to authorize the removal and sale of timber on particular reservations. *E.g.*, 30 Stat. 62, 90; 31 Stat. 785; 34 Stat. 91. Finally, in 1910 the Secretary was authorized generally to sell timber on unallotted lands and apply the proceeds of the sales (after deductions for administrative expenses) to the Indians' benefit. Act of June 25, 1910, ch. 431, Section 7, 36 Stat. 857, as amended, 25 U.S.C. 407. At the same time, Congress authorized the Secretary to consent to the sale of timber by the owner of any Indian land "held under a trust or other patent containing restrictions on alienations" (Section 8, as amended, 25 U.S.C. 406(a)). The Secretary was directed to pay the proceeds of such sales (after deductions for administrative expenses) to the "owner" of the allotted lands. *Ibid.*

The course of this legislation makes clear that Congress did not contemplate in 1887, when the General Allotment Act was enacted, that the Secretary would conduct timber sales for allotted lands.[17] Indeed, it was Congress' intent to allow allotments only of land that "may be advantageously utilized for agricultural

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[16] See also *Starr* v. *Campbell*, 208 U.S. 527 (1908) (timber could not be cleared by Indians from allotted lands for the primary purpose of sale).

[17] Similarly, it was not until 1934 that Congress directed the Secretary to manage Indian forestry units on a sustained-yield principle. 25 U.S.C. 466.

or grazing purposes." 25 U.S.C. 331. The need to remove timber for the primary purpose of sale, rather than for the purpose of improving the land for agricultural use, was not foreseen as a consequence of the Act. See *United States* v. *Payne*, *supra*, 264 U.S. at 449. It is thus a misreading of history to suggest that the Act established a "trust" responsibility for the management of allotted forest lands.

Moreover, when Congress did authorize the Secretary to consent to the sale of timber on allotted lands in 1910, Congress did not distinguish between lands held "under a trust or other patent containing restrictions on alienations * * *." 25 U.S.C. 406(a). See also 25 U.S.C. 466 (sustained-yield management for all "Indian forestry units"); notes 2, 17, *supra*. No. doubt for this reason, the Court of Claims abjured any reliance on these management statutes (Pet. App. 12a) in reaching its broad conclusion that the General Allotment Act establishes the government's consent to suit to "breach of trust" claims for money damages by Indian allottees. There is, in any event, nothing in the language of these statutes, or in their legislative history, that unequivocally establishes the government's liability to suit for "breach of trust" in the management of timber resources on allotted lands.[18] In directing the Secretary to make certain

[18] Respondent's allegation that unlawful fees have been exacted by the Secretary in the administration of timber sales (see page 7, *supra*) may be within the Court of Claims' jurisdiction as a suit for money "improperly exacted or retained." *United States* v. *Testan*, *supra*, 424 U.S. at 400, 401. See note 6, *supra*; *Clapp* v. *United States*, 117 F. Supp. 576 (Ct. Cl.), cert. denied, 348 U.S. 834 (1954). But

discretionary management decisions, the statutes contain no "provision * * * that expressly makes the United States liable" or "grant[s] * * * a right of action with specificity." *United States* v. *Testan*, *supra*, 424 U.S. at 400. Nor do the statutes speak in terms of money damages or of a money claim against the United States for "breach of trust."[19] See *Gnotta* v. *United States*, *supra*, 415 F.2d at 1275. The statutes thus do not overcome the presumption that the United States has not consented to suit for such claims. See, *e.g.*, *United States* v. *Testan*, *supra*, 424 U.S. at 398; *Jackson* v. *Lynn*, *supra*, 506 F.2d at 236.

B. The Special Relationship Between The United States And Indian Tribes Does Not Create A Consent To Suit In Money Damages For Breaches Of Trust In The Management Of Indian Lands

The Court of Claims found it unnecessary to consider whether the special relationship between the United States and Indian tribes—based on "un-

see *United States* v. *Holland-America Lijn*, 254 U.S. 148 (1920). But this narrow theory of jurisdiction cannot support the broad holding of the Court of Claims that the General Allotment Act creates a remedy for "breach of trust" in the management of the allotted lands.

[19] The statutes do support a claim that the United States has consented to suit to enforce its undertaking to pay the proceeds of timber sales (after deducting administrative expenses) to the owners of the allotted lands under 25 U.S.C. 406(a). See *Jackson* v. *Lynn*, *supra*, 506 F.2d at 236 (a right "for the payment of money"); *United States* v. *Ohio Oil Co.*, *supra*, 163 F.2d at 636 (an "express obligation to pay"). Respondents do not contend, however, that the Secretary has failed to pay over the proceeds of any sale or failed otherwise to expend the money for their benefit as the statute permits. 25 U.S.C. 406(a).

anchored, judge-created principles of fiduciary law" (Pet. App. 5a)—establishes a right to money damages for "breach of trust" within the court's jurisdiction over claims "for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. 1491.[20] Nor did respondents advance this contention in the Court of Claims. Although they do so now, as an alternative basis for supporting the judgment below (Br. in Opp. 16-17), the question is not properly presented for review in this court.[21] We nonetheless address it briefly at this point.

It is fundamental that the United States may not be sued without its unequivocal consent. *United States* v. *Testan*, *supra*, 424 U.S. at 399; *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). There must be "affirmative statutory authority" for the

[20] The court chose to rely solely on the theory that the General Allotment Act creates a right to money damages for "breach of trust" within the court's jurisdiction over individual claims founded upon an "Act of Congress," 28 U.S.C. 1491, and tribal claims based on a "law[] * * * of the United States," 28 U.S.C. 1505. See Pet. App. 4a-8a.

[21] *E.g.*, *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967). For the same reason, respondents' suggestion that the Treaty of Olympia and the General Allotment Act are "a form of contract" within the Court of Claims jurisdiction over claims based on contract (28 U.S.C. 1491) is not properly presented in this case. The claim was not raised by respondent below, nor was it addressed by the Court of Claims. We note, moreover, that the Court of Claims lacks jurisdiction under 28 U.S.C. 1491 for claims based on treaties. See 28 U.S.C. 1491. The suggestion that a treaty is "a form of contract" thus represents an attempt to circumvent this limitation on the court's authority.

suit, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940), and the consent to suit may not be applied "more broadly than has been directed by Congress." *United States* v. *Shaw*, 309 U.S. 495, 502 (1940). This is because only Congress, and neither the courts nor executive officers, may consent to suit against the United States. *United States* v. *United States Fidelity & Guaranty Co.*, *supra*, 309 U.S. at 513; *United States* v. *Shaw*, *supra*, 309 U.S. at 500, 502; *Munro* v. *United States*, 303 U.S. 36, 40-41 (1938).[22]

The "unanchored judge-created principles of fiduciary law" surrounding the government's relations with Indians (Pet. App. 5a) do not constitute "affirmative statutory authority" establishing the government's consent to be sued in money damages for "breach of trust" in the management of Indian lands. Numerous decisions, of course, refer to the "fiduciary" or "guardianship" responsibilities of the United States in its dealings with Indian Tribes. *E.g.*, *United States* v. *Kagama*, 118 U.S. 375, 384 (1886); *McKay* v. *Kaylton*, 204 U.S. 458, 469 (1907); *United States* v. *Creek Nation*, *supra*, 295 U.S. at 109-110; *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297 (1942).[23] But a consent to suit in money damages

[22] These principles apply to Indian claimants, as well as other claimants, without distinction. See, *e.g.*, *Klamath Indians* v. *United States*, 296 U.S. 244, 250, 255 (1935); *Blackfeather* v. *United States*, 190 U.S. 368, 376 (1903).

[23] None of these cases presented or confronted the question whether the sovereign immunity of the United States is waived for "breach of trust" in the management of Indian lands. See also notes 14, 15, *supra*.

for "breaches of trust" cannot be implied merely on the basis of judicial decisions that employ "the word 'fiduciary' and the expression 'guardian ward relationship' * * * to describe generally the nature of the relationship existing between the Indians and the Government." *Gila River Pima-Maricopa Indian Community* v. *United States*, 140 F. Supp. 776, 780-781 (Ct. Cl. 1956). See also *Skokomish Indian Tribe* v. *France*, 269 F.2d 555, 560 (9th Cir. 1969).[24] These judicial descriptions of the underlying basis of relations between the United States and Indians do not constitute the government's consent to suit. Only Congress, and not the courts, can waive the government's immunity and the waiver must be unequivo-

[24] The history of Section 24 of the Indian Claims Commission Act, as amended, 28 U.S.C. 1505, does not support respondents' contention (Br. in Opp. 3-7) that Congress intended to create a general right of action for Indian Tribes against the United States on the theory of "breach of trust." During the debates on the Indian Claims Commission Act, then-Representative Jackson explained that "section 24 of the bill provides that with respect to all grievances that may arise hereafter Indians shall be treated on the same basis as other citizens of the United States in suits before the Court of Claims * * *." 92 Cong. Rec. 5313 (1946). In *Klamath and Modoc Tribes* v. *United States*, *supra*, 174 Ct. Cl. at 489-490, the Court of Claims correctly observed that "section 24 of the Act does exactly what Congressman Jackson said it was intended to do; namely, it gives to Indian tribes the same right to sue in this court as is granted to others under the Tucker Act." And, as this Court held in *United States* v. *Testan*, *supra*, 424 U.S. at 398, the Tucker Act does not create any substantive rights. Instead, it "merely confers jurisdiction whenever the substantive right exists." *Ibid.* See also note 5, *supra*.

cally expressed by "affirmative statutory authority." *United States* v. *United States Fidelity & Guaranty Co.*, *supra*, 309 U.S. at 514. The Court of Claims thus properly withheld any reliance on "unanchored judge-created principles of fiduciary law" (Pet. App. 7a) in determining whether the United States consented to suit for "breach of trust." [25]

The courts' jurisdiction over claims for "liquidated or unliquidated damages in cases not sounding in tort" (28 U.S.C. 1491) also fails to provide an express consent to suits in money damages for "breach of trust." As this Court concluded in *United States* v. *Testan*, the Tucker Act "does not create any substantive right enforceable against the United States for money damages." 424 U.S. at 398. Instead, the Act "merely confers jurisdiction upon [the Court of Claims] whenever the substantive right exists." *Ibid.* The Tucker Act jurisdiction over claims for "liquidated or unliquidated damages" thus does not create

[25] See also *Whiskers* v. *United States*, No. 77-1620 (10th Cir. June 14, 1979), where the court held that general fiduciary principles applicable to the relations of Indians and the United States do not satisfy the requirement in *Testan* that there be a "specific congressional mandate to compensate those injured by the violation of some substantive right." Slip op. 10. The court stated that a "legislative declaration of trust status for a particular fund" (slip op. 6) would constitute a mandate for compensation if payment from the fund is not made. See also *Medbury* v. *United States*, *supra*, 173 U.S. at 497; *United States* v. *Ohio Oil Co.*, *supra*, 163 F.2d at 636. But the court found no such legislative mandate for payment from the particular fund at issue in that case. Slip op. 6-9.

any substantive right in money damages against the United States for claims based on the theory of breach of trust. Moreover, the contention that the court's jurisdiction over claims for "liquidated or unliquidated damages" creates a substantive right to recovery in money damages simply proves too much: if that interpretation of the provision were correct, sovereign immunity would be waived for essentially *all* claims against the United States and the detailed provisions of the Tucker Act and the many federal statutes "that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be superfluous." *Id.* at 404. The language of this provision should not be construed to "swallow practically everything that preceeds it." 1 J. Moore *Federal Practice* ¶ 0.65 [2.-3], at 700.112 n.39 (2d ed. 1979). As one commentator has stated, "[t]he evident purpose of the section is to make clear that the action may seek unliquidated damages as well as sums illegally exacted or amounts fixed by a contract." *Ibid.* The section also makes express the congressional intent "to prevent any tort action from being brought" in the Court of Claims. Developments, *Remedies Against The United States And Its Officials*, *supra*, 70 Harv. L. Rev. at 881. The provision is not intended, and has never been applied, to create a substantive right to recovery for "breach of trust."

CONCLUSION

The judgment of the Court of Claims should be reversed.

Respectfully submitted.

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